VIEW OF ADVOCATE GENERAL
MAZÁK
10 November 2009 [1]

I — Introduction

1. By this reference for a preliminary ruling, which the Court has, at the request of the referring court, decided to deal with under the urgent preliminary ruling procedure provided for in Article 23a of the Statute of the Court, the Administrativen sad Sofia-grad (Sofia City Administrative Court, Bulgaria) has referred to the Court, under Article 68(1) EC in conjunction with Article 234 EC, four questions concerning the interpretation of Article 15(4) to (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ('the Return Directive'). [2]

2. By those questions with their various subdivisions, the referring court in essence seeks a ruling from the Court on the applicability to the present case of the provisions of Article 15 of the Return Directive relating to the maximum duration of detention for the purpose of removal, and how the relevant time-limits are to be calculated, in the light of the circumstances of the case in the main proceedings. Further, the referring court seeks a ruling from the Court on the circumstances in which removal may be considered not to be reasonably possible and whether, or in what circumstances, detention may be continued when there is no reasonable prospect of removal and when it is no longer possible to extend the period of detention.

3. Those questions have arisen in proceedings in which the referring court has been called upon to rule *ex officio*, as the court of final appeal, on the lawfulness and, consequently, on the continuation of the detention of Mr Said Shamilovich Kadzoev in the special

1 — Original language: French.
2 — OJ 2008 L 348, p. 98.

detention facility for foreign nationals near the city of Sofia.

4. It is worthy of comment that, when the Return Directive was adopted, the introduction of rules on the maximum duration of detention was one of the most contentious subjects, because of the significant differences which were to be found — and which to an extent can still be found — in the laws and practices of the Member States.

5. Since this is the first time that the Court has been called on to clarify certain matters relating to the implementation of Article 15 of that directive, this reference for a preliminary ruling therefore assumes an importance which goes beyond the facts of this particular case. It is part of a sensitive and continuing process which seeks to reconcile, on the one hand, the undeniable right of States, recognised by the European Court of Human Rights, to control foreign nationals' entry into and residence in their territory [3] and their legitimate interest in preventing abuses of the law of immigration and asylum with, on the other hand, the requirements of the rule of law and the degree of protection offered to migrants by international law, by Community law and, in particular, by the law of human rights and fundamental freedoms.

3 — See, for example, ECHR, *Amuur v. France*, 25 June 1996, § 41, *Reports of Judgments and Decisions* 1996-III.

II — Legal background

A — *The Return Directive*

6. Article 15 of the Return Directive, which is in the chapter relating to detention for the purpose of removal, is worded as follows:

'1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding, or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as

removal arrangements are in progress and executed with due diligence.

…

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.'

7. Under Article 20 of the Return Directive, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 24 December 2010.

B — *Relevant national law*

8. On 15 May 2009, Bulgaria transposed Article 15(5) and (6) of the Return Directive into national law by means of an amendment [4] to the Law on foreign nationals in the Republic of Bulgaria ('the Law on foreign nationals'). The referring court states, however, that Article 15(4) of the directive has not been transposed into Bulgarian law.

9. Under Article 44(6) of the Law on foreign nationals, where a coercive administrative measure cannot be applied to a foreign national because his identity has not been established or because he is likely to go into hiding, the body which adopted the measure may order the foreign national to be placed in a detention centre for foreign nationals in order to enable his deportation or expulsion from the Republic of Bulgaria to be arranged.

10. Prior to the transposition of the Return Directive by means of the amendments to the Law on foreign nationals adopted on 15 May 2009, the period of detention in such a centre was not subject to any time-limit.

11. Now, under Article 44(8) of the Law on foreign nationals, '[t]he detention shall last as long as the circumstances set out in paragraph 6 above pertain but may not exceed six months. Exceptionally, where the person refuses to cooperate with the competent authorities, where there is a delay in obtaining the documents essential for deportation or expulsion, or where the person constitutes a threat to national security or public order, the period of detention may be extended to 12 months'.

12. Article 46a(3) to (5) of the Law on foreign nationals provides:

'(3) Every six months the head of the detention centre for foreign nationals shall present a list of the foreign nationals who have been detained for more than six months owing to impediments to their removal from Bulgarian territory. The list is to be sent to the administrative court of the place where the detention centre is situated.

(4) At the end of each period of six months' detention in a detention centre, the court deliberating in private shall of its own motion determine whether the period of detention is to be extended, replaced, or terminated. No appeal shall lie against the court's decision.

4 — 'Provisions supplementing the law amending and completing the Law on foreign nationals in the Republic of Bulgaria' (Bulgarian Official Journal No 36/2009), of which paragraph 16 provides that the law constitutes the transposition of the Return Directive.

(5) Where the court annuls the contested detention order or orders the foreign national to be released, the latter shall be immediately released from the detention centre.'

III — The facts of the main proceedings and the questions referred for a preliminary ruling

13. The salient facts of the proceedings, in so far as relevant for present purposes, may be summarised as follows.

14. On 21 October 2006 Mr Kadzoev was arrested by Bulgarian law enforcement officials near the border with Turkey. At the time of his arrest he had no identity documents and said that his name was Said Shamilovich Huchbarov and that he was born on 11 February 1979 in Grozny, Chechnya. He stated, at the time of his arrest, that he did not want the Russian consulate to be informed of his arrest. He subsequently admitted that the identity provided was false and that his real surname was Kadzoev, and he produced a birth certificate showing that he was born on 11 February 1979 in Moscow, in the former Soviet Union, that his father, Shamil Kadzoev, was of Chechen nationality, and that his mother, Loli Elihvari, was of Georgian nationality.

15. On 22 October 2006 a decree (No 3469) was made ordering his 'coercive detention'. On the basis of that decree Mr Kadzoev was placed in the detention centre of Liubimets, in the Elhovo region, where he was detained until 3 November 2006. By decrees of 22 October 2006 he was also subject to coercive administrative measures of 'coercive deportation' and 'prohibition of entry'.

16. Pending execution of the coercive administrative measure of deportation imposed on him, Mr Kadzoev was placed, pursuant to a coercive detention decree (No 3583) of 1 November 2006, in the special detention facility for foreign nationals at Busmantsi, near Sofia. He was ordered to be detained until it was possible to execute the measure of coercive deportation, that is, until documents were obtained enabling him to travel abroad and until sufficient funds were secured for the purchase of a ticket to Chechnya.

17. Mr Kadzoev initiated proceedings for the judicial review of the decrees relating to deportation, the prohibition on entering the Republic of Bulgaria, and the compulsory detention in a centre for the detention of foreign nationals, all which actions were dismissed. Consequently, all those measures, including placement in the detention facility, became enforceable.

18. However, despite the efforts of the Bulgarian authorities, non-governmental organisations and Mr Kadzoev himself to find a safe third country, no specific agreement has been reached and the present position is that he has not obtained any travel documents.

19. On 31 May 2007, while he was in the special detention facility for foreign nationals, Mr Kadzoev made an application for recognition of his status as a refugee. By decision of 9 October 2007 the Sofia City Administrative Court dismissed that application. On 21 March 2008 he made a second application for asylum, but withdrew it on 2 April 2008. On 24 March 2009 Mr Kadzoev made a third application for recognition of refugee status. By decision of 10 July 2009 the Sofia City Administrative Court dismissed Mr Kadzoev's application. No appeal lies against that decision.

20. It is also stated in the order for reference that on two occasions Mr Kadzoev requested that the measure of compulsory detention be replaced by a less coercive measure, namely the obligation periodically to sign a police register at his place of residence; the requests were dismissed by the competent authorities because he provided an address which could not be verified.

21. It must be stated that Mr Kadzoev is still being held in the special detention facility for foreign nationals in Busmantsi.

22. The main proceedings have arisen because an administrative document was lodged at the Sofia City Administrative Court by the director of the Directorate for Migration at the Ministry of the Interior requesting that court to rule *ex officio*, on the basis of Article 46a(3) of the Law on foreign nationals, on the duration of Mr Kadzoev's detention in the special detention facility for foreign nationals in Busmantsi.

23. Those are the circumstances in which the referring court decided to stay the proceedings and to refer to the Court the following questions, with the request that they be dealt with under the urgent preliminary ruling procedure:

'1. Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that:

(a) where the national law of the Member State did not provide for a maximum period of detention or

grounds for extending such detention before the transposition of the requirements of that directive and, on transposition of the directive, no provision was made for conferring retroactive effect on the new provisions, the requirements of the directive only apply and cause the period to start to run from their transposition into the national law of the Member State?

(b) within the periods laid down for detention in a specialised facility with a view to removal within the meaning of the directive, no account is to be taken of the period during which the execution of a decision of removal from the Member State under an express provision was suspended owing to a pending request for asylum by a third-country national, where during that procedure he continued to remain in that specialised detention facility, if the national law of the Member State so permits?

2. Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that within the periods laid down for detention in a specialised facility with a view to removal within the meaning of that directive no account is to be taken of the period during which execution of a decision of removal from the Member State was suspended under an express provision on the ground that an appeal against that decision is pending, even though during the period of that procedure the third-country national has continued to stay in that specialised detention facility, where he did not have valid identity documents and there is therefore some doubt as to his identity or where he does not have any means of supporting himself or where he has demonstrated aggressive conduct?

3. Must Article 15(4) of Directive 2008/115/EC … be interpreted as meaning that removal is not reasonably possible where:

(a) at the time when a judicial review of the detention is conducted, the State of which the person is a national has refused to issue him with a travel document for his return and until then there was no agreement with a third country in order to secure the person's entry there even though the administrative bodies of the Member State are continuing to make endeavours to that end?

(b) at the time when a judicial review of the detention is conducted there was an agreement for readmission between the European Union and

the State of which the person is a national, but, owing to the existence of new evidence, namely the person's birth certificate, the Member State did not refer to the provisions of that agreement, if the person concerned does not wish to return?

(c) the possibilities of extending the detention periods provided for in Article 15(6) of the directive have been exhausted in the situation where no agreement for readmission has been reached with the third country at the time when a judicial review of his detention is conducted, regard being had to Article 15(6)(b) of the directive?

4. Must Article 15(4) and (6) of Directive 2008/115 … be interpreted as meaning that if at the time when the detention with a view to removal of the third-country national is reviewed there is found to be no reasonable ground for removing him and the grounds for extending his detention have been exhausted, in such a case:

(a) it is none the less not appropriate to order his immediate release if the following conditions are all met: the person concerned does not have valid identity documents, whatever the duration of their validity, with the result that there is a doubt as to his identity, he is aggressive in his conduct, he has no means of supporting himself and there is no third person who has undertaken to provide for his subsistence?

(b) with a view to the decision on release it must be assessed whether, under the provisions of the national law of the Member State, the third-country national has the resources necessary to stay in the Member State as well as an address at which he may reside?'

IV — View

24. As a preliminary point, since Mr Kadzoev has, in his observations, disputed the accuracy of several statements of fact in the order for reference, in particular as regards his alleged aggressive conduct during his detention, and has drawn attention to deficiencies in relation to, generally, the law of immigration and asylum in force in Bulgaria and, in particular, the conditions of his detention, it must be recalled that, in accordance with the division of functions between the Court and the national court in the preliminary ruling procedure under Article 234 EC, it is for the national court alone to define the legal and factual context of a question referred for a preliminary ruling and to determine, in the light of the facts and the relevant provisions of

national law, the subject-matter of the questions referred for a preliminary ruling and, ultimately, to apply the rules of Community law, as interpreted by the Court, to the particular case. [5]

25. The Court therefore has no jurisdiction to assess the facts of the case or to rule on the lawfulness of Mr Kadzoev's detention and the proceedings relating to it, which are, in any event, also the subject of an application to the European Court of Human Rights. [6] The Court must rather confine itself to giving a ruling on the questions of interpretation of Community law referred to it which will be of use in the main proceedings.

26. Accordingly, I shall now examine the questions referred for a preliminary ruling, generally in the order in which they have been submitted. It appears however, that Question 2 and Question 1(b) can usefully be examined together, given that those questions both concern circumstances in which execution of a decision of removal can be suspended.

27. It is however first necessary to consider the matter of admissibility of the questions referred for a preliminary ruling, since, in particular, the questions relate to a directive which has a period for transposition which has not yet expired.

A — *Admissibility*

28. It must, at the outset, be recalled that, according to settled case-law, it is for the national court hearing a dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Accordingly, where the questions referred concern the interpretation of Community law, they enjoy a presumption of relevance, so that the Court is, as a general rule, obliged to give a ruling. [7]

29. Also in accordance with settled case-law, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the

5 — See, to that effect, for example, Case C-107/98 *Teckal* [1999] ECR I-8121, paragraphs 31, 34, 39; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraphs 22 and 23; and Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 24.

6 — *Said Shamilovich Kadzoev v. Bulgaria*, lodged on 20 December 2007.

7 — See, to that effect, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 30; Case C-286/02 *Bellio F.lli Srl* [2004] ECR I-3465, paragraph 27; and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 24 and case-law cited.

problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [8]

30. However, that is not, in my opinion, the situation in this case. In particular, it is not obvious that the questions referred have no relevance to the decision which the referring court is called upon to make, even though the period for the transposition of the Return Directive had not yet expired when the referring court was asked to examine the lawfulness of Mr Kadzoev's detention.

31. To begin with, it is common ground that the directive, in accordance with Article 22, entered into force on the 20th day following that of its publication in the *Official Journal of the European Union*, which was 24 December 2008, in other words on 13 January 2009.

32. It follows from the Court's case-law that, although Member States to which a directive is addressed cannot of course be criticised for not transposing that directive into their legal systems before the expiry of the period for transposition, they must none the less refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by the directive. [9]

33. The Court has also specified that all the authorities of the Member States concerned, including the national courts, have such an obligation to refrain from taking measures. It follows that, from the date on which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might, after the period for transposition has expired, seriously compromise the attainment of the objective pursued by that directive. [10]

34. In that regard, it is clear in the present case that, as the referring court states, the legislation serving to amend the Law on foreign nationals must be regarded as the formal transposition of the Return Directive into Bulgarian law.

35. If the national court interpreted and applied the transposing legislation in a way that was contrary to that directive, in particular to the provisions concerning the

8 — See, to that effect, *van der Weerd and Others*, paragraph 22 and case-law cited, and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39.

9 — See Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45; Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58; and Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 67.

10 — See, in particular, Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraphs 122 and 123, and Joined Cases C-261/07 and C-299/07 *VTB-VAB and Others* [2009] ECR I-2949, paragraph 39.

permissible duration of detention, and thus set precedents, there would be a risk that attainment of the objective pursued by the directive would be seriously compromised, after expiry of the period for transposition.

36. Consequently, given that the referring court has referred questions for a preliminary ruling in order to ensure that the interpretation and application of the Law on foreign nationals is compatible with the Return Directive, thereby ensuring that the obligation to refrain from taking measures within the meaning of the *Inter-Environnement Wallonie* line of case-law is observed, the requested interpretation of that directive must be regarded as of assistance to the referring court to enable it to give a ruling in the case before it. [11]

37. Admittedly, the further question may arise of whether it should also be concluded that the third question referred for a preliminary ruling is admissible, since it relates to Article 15(4) of the Return Directive which, as advised by the referring court, has not been transposed into national law.

38. In my opinion, the answer should nevertheless be that it is admissible.

39. In that regard, first, I question whether it is possible to analyse Article 15(4) in isolation, independently of the other provisions of Article 15 governing detention for the purpose of removal.

40. Since Article 15(4) provides that detention ceases to be justified and that the person concerned is to be released immediately when it appears that a reasonable prospect of removal no longer exists or when the conditions for detention stated in Article 15(1) no longer exist, Article 15(4) is no more than the reflection of the rule already stated in the other paragraphs of Article 15 — in particular, Article 15(1) and (5) — pursuant to which any detention must be for as short a period as possible and can be maintained only as long as the conditions for detention are met, a rule which, moreover, is an expression of the principle of proportionality stated in recital 16 of the Return Directive. [12]

41. If the other provisions of Article 15 of the Return Directive have in fact been transposed into Bulgarian law, it seems difficult to maintain that Article 15(4) has not been transposed. Indeed, the referring court has itself stated that it would infer the normative force of that provision from Article 44(8) of the Law on foreign nationals.

11 — In this context, see *VTB-VAB and Others*, paragraph 40.

12 — See also points 50 to 52 below.

42. In any event, secondly, it must be borne in mind that the obligations imposed on Member States during the period for transposition of a directive by the *Inter-Environnement Wallonie* line of case-law, including the obligation on every national court, when interpreting domestic law, to take account of such a directive, stem from the obligation to ensure that the objective pursued by the directive is attained after the expiry of the period for transposition. [13]

43. Consequently, even if there were indeed a lacuna in the legislation transposing the Return Directive into Bulgarian law as regards the transposition of Article 15(4) of that directive, whether that lack of transposition and an ensuing national court decision contrary to the directive would jeopardise the objective pursued by the directive depends ultimately on the specific circumstances of the particular case. Thus, if the provisions in question are to be regarded, notwithstanding the abovementioned lacuna, as constituting the final transposition of the directive by the national authorities, such a risk can be presumed. If, on the other hand, Article 15(4) of the Return Directive had not yet been transposed into domestic law when the main proceedings were commenced because the Bulgarian legislature had decided to implement that directive gradually and envisaged transposing that specific provision at a later date, before the expiry of the period for transposition, it cannot be accepted that the omission to transpose that provision or an interpretation of the applicable legislation running counter to that provision would necessarily jeopardise the objective pursued by the directive. [14]

44. It is, admittedly, for the national court to rule finally on that matter, but it must be stated that it is not clear, on any view, from the order for reference that a specific transposition of Article 15(4) of the Return Directive is still envisaged. In addition, since the Bulgarian Government stated at the hearing that it considered that provision to have been transposed into Bulgarian law, it is hardly to be expected that specific transposing measures will yet emerge before the period for transposition lapses.

45. It follows that it is not obvious, at least not clearly so, that the interpretation of that provision which is requested by the third question referred for a preliminary ruling has

13 — See, to that effect, *Inter-Environnement Wallonie*, paragraphs 40 and 44. Some academic commentators maintain that a national court is always bound to interpret provisions of national law, so far as possible, in a way consistent with a directive whose transposition period has not yet expired at the time of the main proceedings, if the provisions of national law concerned were specifically introduced in order to transpose that directive. However, even if there are indications to that effect in the Court's case-law (see, for example, Case C-165/98 *Mazzoleni* [2001] ECR I-2189, paragraph 17, and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraphs 12, 15 and 16 read together), to my knowledge the Court has not hitherto explicitly ruled that there is such a general obligation of consistent interpretation during the period for transposition of a directive. I therefore can only assess the possible effects of a directive prior to the expiry of the period for its transposition, in the specific circumstances, in the light of the obligation to refrain from taking measures imposed on national courts by the *Inter Environnement Wallonie* line of case-law.

14 — See, to that effect, *Inter-Environnement Wallonie*, paragraphs 46 to 49.

no relevance to what is at issue in the main proceedings. [15]

46. That being the case, I consider that all the questions referred by the Administrativen sad Sofia-grad should be answered.

47. Lastly, it should be added that, when examining this reference for a preliminary ruling, care must be taken not to confuse the various questions as to temporal application which arise in this case. Accordingly, I consider that a clear distinction must be made between, on the one hand, the question which I have just considered, the question of the extent to which the national court may be bound, in order to give a ruling in the main proceedings, to take account of the Return Directive even before the expiry of the period for its transposition, and, on the other hand, the substantive question which is the subject of the first question referred for a preliminary ruling, relating to the question whether Article 15(5) and (6) of the Return Directive impose an obligation also to take account of periods of detention which occurred prior to the entry into force of the legislation transposing that directive, when calculating the duration of detention. The latter question will, moreover, also be raised in court proceedings relating to the lawfulness of detention which take place after the date of expiry of the period for transposition of the Return Directive.

15 — See point 30 above.

B — *Substance*

1. Question 1(a)

48. It is useful initially to give a brief outline of the requirements of the Return Directive as regards the duration of detention for the purpose of removal.

49. In Article 15(5) of the Return Directive, the Community legislature provided that the period of detention for the purpose of removal is limited to six months. Under Article 15(6) of the directive, Member States may extend that period for a further period of 12 months at most, when justified by lack of cooperation by the third country national concerned or delays in obtaining the necessary documents from third countries. It follows that the maximum period of detention, according to the directive, cannot exceed a total of 18 months.

50. It is important nevertheless to note that the periods thus laid down define only the absolute and outside limits of the duration of detention. Thus, as is clear, in particular, from the wording of Article 15(1) and (5) of the Return Directive, any detention prior to removal must be for as short a period as possible and may be maintained only as long as removal arrangements are in progress and

executed with due diligence. In addition, the detention must be brought to an end when the conditions for detention no longer exist or when there is no longer any reasonable prospect of removal.

51. Those requirements are also, as I have previously mentioned, an expression of the principle of proportionality to which detention is subject and which limits its duration, as stated in recital 16 of the directive.

52. Lastly, it also follows from the fundamental rights which form an integral part of the general principles of law the observance of which is ensured by the Court, [16] including the right to liberty as guaranteed by Article 5 of the European Convention on Human Rights, that the duration of detention for the purpose of deportation cannot exceed the period which is reasonably necessary to achieve the objective pursued. More specifically, as Mr Kadzoev correctly submitted in this context, the compulsory detention to which he is subject pending his removal — to be categorised, of course, as 'detention' within the meaning of the Return Directive — constitutes a deprivation of liberty within the meaning of Article 5, which must therefore be justified on the basis of Article 5(1)(f) of that convention, relating to the detention of a person against whom action is being taken with a view to his deportation or extradition. In that regard, even though the convention does not impose any absolute limit on the period of detention for the purpose of deportation/removal, it is clear from the case-law of the European Court of Human Rights that national authorities must act with the necessary diligence to ensure that such a period of detention is limited to as short a duration as possible. If, on the other hand, the process is not carried out with due diligence, the detention ceases to be justified under Article 5(1)(f) of the convention. [17]

53. It follows that, by virtue of the requirements of Article 15 of the Return Directive, the detention of a person for the purpose of his removal must cease as soon as possible and becomes unlawful as soon as the 'practical' conditions of detention defined by that article — in particular that the removal arrangements are in progress and are carried out with all due diligence, and that there is a reasonable prospect of removal — no longer exist or, in any event, after the maximum period of detention calculated according to Article 15(5) and (6) of the directive has elapsed.

16 — See to that effect, for example, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41, and Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraph 12. Further, as stated in Article 1 of the Return Directive, that directive sets out standards and procedures to be applied 'in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations'.

17 — See, to that effect, in particular ECHR, *Chahal v. the United Kingdom*, 15 November 1996, § 113, *Reports of Judgments and Decisions* 1996-V; ECHR, *Mikolenko v. Estonia*, no. 10664/05, §§ 59 to 61, 8 October 2009; see also Guideline No 7 of the Twenty Guidelines on forced return adopted on 4 May 2005 by the Committee of Ministers of the Council of Europe and the commentary on those guidelines by the ad hoc committee of experts on the legal aspects of territorial asylum, refugees and stateless persons (CAHAR), published in September 2005, comments on Guideline No 7.

54. That said, in the main proceedings, the referring court has to rule on the lawfulness and continuation of Mr Kadzoev's detention for the purpose of his removal on the basis, inter alia, of Article 44(8) of the Law on foreign nationals, as amended, transposing Article 15(5) and (6) of the Return Directive into Bulgarian law with effect from 18 May 2009.

55. Given that the transposing legislation does not contain any transitional provisions concerning the temporal application of the legislation and that consequently there is no provision that the legislation is to be retrospective, the referring court in essence seeks to ascertain, in Question 1(a), whether that court should, when ruling on the lawful period of detention, take into account, as facts of legal relevance, periods of detention prior to the entry into force of the legislation transposing Article 15(5) and (6) of the Return Directive or, on the contrary, whether it should assess the lawful period of detention solely by reference to facts and periods of detention subsequent to that date.

56. In that regard, it is appropriate first to recall the principles stated by the Court in relation to the temporal effect of legal rules.

57. While it is true that, as a general rule, the principle of legal certainty precludes a rule from being applied retroactively, [18] that principle cannot, in accordance with settled case-law, be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule. [19]

58. Thus, the Court has established, in settled case-law, the principle that a new rule applies immediately to continuing situations which arose under the old rules. [20]

59. On the other hand, in relation to situations existing or rights acquired prior to the entry into force of rules of substantive law, those rules must be interpreted, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, as applying to existing situations only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them. [21] Procedural rules, on the other hand,

18 — See, to that effect, for example, Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249, paragraph 42.

19 — See, inter alia, Case C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR I-9465, paragraph 43.

20 — See, to that effect, Case 270/84 *Licata* v *ESC* [1986] ECR 2305, paragraph 31; Case C-60/98 *Butterfly Music* [1999] ECR I-3939, paragraph 24; and Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50.

21 — See, to that effect, *Pokrzeptowicz-Mayer*, paragraph 49.

are generally held to apply to all proceedings pending at the time when they enter into force. [22]

60. The circumstances of the present case must now be considered more closely in the light of those principles.

61. It is clear, in the first place, that the situation which gave rise to the main proceedings, namely Mr Kadzoev's detention, albeit that its starting point precedes the entry into force of the legislation transposing the Return Directive into Bulgarian law, quite obviously cannot be regarded as a situation which has been completed or established prior to the entry into force of that legislation and to which that legislation will therefore apply 'retroactively'. It is rather a classic example of a continuing situation which began in the past, but which persists when the main proceedings commence. If the Return Directive is applied to the present case via the transposing legislation in order to decide on the lawfulness of Mr Kadzoev's detention, and thereby on the possibility of its being extended, that is therefore consistent with the abovementioned well-known principle, established by the Court, that new rules apply immediately to continuing situations. [23]

62. That said, the question remains whether it is possible to examine the lawfulness of the detention solely to the extent that it occurred after the entry into force of the transposing legislation.

63. I do not consider it possible to divide the period of detention in such a way for the purposes of applying the rules relating to the duration of detention which are laid down by the Return Directive.

64. In that regard, it should first be recalled that the maximum periods of detention laid down in Article 15(5) and (6) of the Return Directive are part of a body of rules intended to ensure that detention is proportionate, in other words that its duration is for as short a period as possible and, in any event, not for longer than the 6 months or, as the case may be, the 18 months provided for. [24] If therefore the essential issue, in a case such as the present, is whether the duration of detention is reasonable and whether its continuation is still justified, I do not see how one could approach such an assessment other than by taking account of the entire period that the detention has actually lasted. It appears, at the very least, highly arbitrary to ignore, when considering the duration of detention, certain periods on the ground that they precede the entry into force of the transposing legislation. The consequence of reading the requirements of the Return Directive in such a way would, obviously, be that a national court could conclude, on the basis of the transposing legislation, that the detention of a person for

22 — See, for example, Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 22.

23 — See *Pokrzeptowicz-Meyer*, paragraph 52.

24 — See, in that regard, points 49 to 53 above.

the purpose of his removal was proportionate, in other words justified, notwithstanding the extended duration of detention of the person concerned, a situation which seems to me less than acceptable.

65. It is necessary, in the second place, to ascertain the actual objective pursued by the setting of maximum periods of detention in Article 15(5) and (6) of the Return Directive. In other words, are those provisions essentially intended to impose the requirement that, as from the date of their transposition into national law, any then current detention can be extended only for a maximum period of 18 months in addition to, and irrespective of, the time already spent in detention? Or must those provisions be understood, on the contrary, as stating the maximum acceptable period of detention, namely that 'no-one can be detained for the purpose of removal for more than 18 months', with the result that a person who, for example, has, when the transposition of that rule enters into force in national law, already been detained for three months, cannot be further detained for more than a maximum of 15 months, and that a person who, at that time, has already been detained for more than 18 months, that is for more than the maximum period, must be released immediately?

66. In my opinion, it is clearly the latter interpretation which is to be preferred, in the light of the objective of the provisions relating to the setting of maximum periods of detention for the purpose of removal, which includes ensuring that the individual concerned can enjoy his fundamental right of freedom, any exception being subject to strict conditions.

67. In the light of the foregoing, the answer which I propose to Question 1(a) is that, in order to assess the lawful duration of a period of detention and its continuation with regard to legislation by which Article 15(5) and (6) of the Return Directive were transposed into national law, account must be taken of the actual duration of that detention, including, consequently, periods of detention which precede the date of entry into force of the transposing legislation.

2. Question 1(b) and Question 2

68. Those questions relate to whether, when calculating the periods of detention laid down in Article 15(5) and (6) of the Return Directive, account should be taken of periods of detention during which execution of the decision of removal was suspended.

69. I shall examine, first, Question 2, which relates to the suspension of a removal decision because of judicial review proceedings brought against that decision, then, second, the rather more specific situation of a

suspension because of proceedings for the grant of asylum which is the subject of Question 1(b). It must be added, as a preliminary point, that in both situations, as is clear from the order for reference, it must be assumed that the third country national concerned, Mr Kadzoev, not only — so it seems — continued to stay in the same detention centre throughout the periods when the removal decision in question was suspended, but also was always there on the basis of an order for his compulsory detention.

70. It must, at the outset, be reiterated that, since compulsory detention constitutes a deprivation of liberty, the circumstances in which such detention is permitted must be interpreted strictly, as an exception to a fundamental guarantee of individual liberty. [25]

71. It must next be observed that there is nothing in the wording of Article 15(5) and (6) of the Return Directive to suggest that account should not be taken of certain periods of detention for the purpose of removal when calculating the maximum duration of detention as established by those provisions, on the ground, for example, that execution of the removal decision had been suspended.

25 — See point 52 above; see also, in that regard, ECHR, *Mohd v. Greece*, no. 11919/03, § 18, 27 April 2006.

72. Article 15(5) of the Return Directive provides, quite unequivocally, that each Member State is to set a limited period of detention 'which may not exceed six months'. Next, it is clear from the wording of Article 15(6) of the directive that that period can be extended only exceptionally and, in any event, only for a limited period not exceeding a further 12 months.

73. Furthermore, the circumstances in which such an extension of the period of detention can be envisaged are clearly and comprehensively defined in that provision, which covers the situation where, despite all reasonable efforts, it is probable that the removal operation will take more time either because of a lack of cooperation from the third-country national concerned, or because of delays in obtaining necessary documentation from third countries. By introducing those grounds for extension, the Community legislature chose to take account of the practical difficulties which might be encountered by Member States when undertaking the removal of illegally staying third-country nationals.

74. However, it is clear that the suspension of the removal decision because of judicial review proceedings brought against that decision does not appear among those grounds for extension and, in any event, no provision is made by Article 15(5) and (6) of the Return Directive for any extension of the period of detention beyond the additional 12 months.

75. Consequently, Article 15(5) and (6) of the Return Directive cannot, in the absence of explicit provisions to that effect, be interpreted as allowing periods of detention during which execution of the removal decision was suspended because of judicial review proceedings brought against that decision to be disregarded for the purpose of calculating the duration of detention in accordance with that article, with the result that a detention for the purpose of removal beyond the prescribed maximum duration of 18 months would be permitted.

76. That conclusion is not, in my opinion, called into question by the Court's judgment, relied on by the Bulgarian Government, in *Petrosian and Others*, [26] which concerned the interpretation of Regulation (EC) No 343/2003. [27] In that case, the Court in essence held that, where national law provides for a judicial review procedure which has suspensive effect, the period of implementation of a transfer of an asylum seeker laid down by Article 20(1)(d) of that regulation runs not from the date of the provisional judicial decision suspending the implementation of the transfer procedure, but only from the date of the judicial decision which rules on the merits of the procedure. [28]

77. Neither that decision nor the reasoning behind it can, however, be directly transposed to the present case, since the time-limits at issue are different in kind. While the period at issue in *Petrosian* determines the time available to the requesting Member State for implementing the transfer of an asylum seeker to the Member State which is obliged to re-admit him, the maximum periods laid down in Article 15(5) and (6) of the Return Directive serve the purpose of ensuring that the period in which an individual who is merely staying illegally can be deprived of his liberty is limited to a reasonable period. Moreover, the periods at issue in this case set a limit on the period of detention for the purpose of removal, and not, at least not directly, on the implementation of the removal as such, which may include, if necessary, judicial review proceedings brought against the removal decision.

78. As regards, lastly, the factors to which the referring court has referred in Question 2, namely the uncertainty as to the identity of the foreign national, his not having any means of subsistence or his aggressive behaviour, those circumstances are obviously of no relevance to the question of principle whether account must be taken, when calculating the periods of detention laid down in Article 15(5) and (6) of the Return Directive, of a period of detention during which the execution of the removal decision was suspended because of a judicial review procedure against that decision. [29] In this context, it is also of little importance whether the foreign national continued to stay, during the period concerned, in the same special detention centre — the decisive

26 — Case C-19/08 *Petrosian and Others* [2009] ECR I-495.

27 — Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1).

28 — The Court stated, in that regard, in particular that, in the light of the objective pursued by setting such a period, Member States were to have a period of six months for them to make full use of in order to determine the practical details for carrying out the transfer. Member States might otherwise be inclined to disregard/eliminate the suspensive effect of the provisional decision in order to have available the time necessary to organise the transfer of the asylum applicant.

29 — See also point 101 below.

question, for the purposes of calculating the maximum duration of detention, being only whether that foreign national was, throughout that period, in fact detained for the purpose of removal.

79. In the light of the foregoing, the answer to Question 2 must be that, when calculating the duration of detention in accordance with the provisions of Article 15(5) and (6) of the Return Directive, account must be taken of the period of detention during which execution of a removal decision was suspended, under an express provision of national law, because of judicial review proceedings brought against that decision.

80. As regards, secondly, the question whether the periods of detention for the purpose of removal referred to in Article 15(5) and (6) of the Return Directive should also include a period in which implementation of a removal decision was suspended because of asylum proceedings initiated by the third-country national concerned, it must be observed, first, that, under Article 2(1) of that directive, that directive applies only to third-country nationals who are staying illegally within a Member State.

81. However, as is stated in recital 9 in the preamble to the Return Directive, in accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [30] a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally in the territory of that Member State until a negative decision on the application, or a decision ending his right of stay as an asylum seeker has entered into force.

82. It follows that a third-country national who has applied for asylum does not fall — or, as the case may be, ceases to fall — within the scope of the Return Directive for as long as the process of examining his asylum application is ongoing.

83. In so far as the asylum applicant can no longer be considered to be staying illegally within the Member State and is outside the scope of the Return Directive, his detention in order to ensure execution of the measure of removal can no longer be justified on the basis of that directive.

30 — OJ 2005 L 326, p. 13.

84. His status and his rights as an asylum applicant are then governed by the applicable rules of international and Community law on asylum, in particular by the Geneva Convention of 28 July 1951 on the status of refugees, and by Directive 2005/85 and Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. [31]

85. In that regard, it should be noted that, although a person cannot be detained for the sole reason that he is an applicant for asylum, [32] the detention of an asylum applicant is not, as such, prohibited under the international and Community law of asylum. [33]

86. Thus, for example, Article 7 of Directive 2003/9 provides for detention where that proves necessary for legal reasons or reasons of public order. In any event, such detention of an asylum applicant must naturally be based on and justified in accordance with the particular conditions laid down in the relevant rules governing asylum and cannot be legally based on the law governing the status of persons who are staying illegally.

87. That analysis produces, I believe, a mixed picture, as concerns the present case.

88. If the detention when Mr Kadzoev's asylum application was being examined was based on an order for his compulsory detention pursuant to the relevant regulations governing asylum, that detention could not be regarded as detention for the purpose of removal within the meaning of the Return Directive. Its duration therefore could not be governed by Article 15 of the directive and, consequently, could not be taken into account when calculating the periods of detention laid down by that article. [34]

89. If, on the other hand, the position is that Mr Kadzoev simply continued to be detained on the basis of the original detention order

31 — OJ 2003 L 31, p. 18.

32 — See, in that regard, for example, Article 18(1) of Directive 2005/85.

33 — See, in this context, for example, ECHR, *Saad v. the United Kingdom* [GC], no. 13229/03, § 65, ECHR 2008; ECHR, *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 70, ECHR 2008; see also Human Rights Committee, Communication No 560/1993: Australia. 30/04/97. CCPR/C/59/D/560/1993, paragraph 9.3.

34 — Nor could possible periods of deprivation of liberty based on other legal provisions, for example, based on domestic criminal law.

after making his application for asylum and that the authorities took no separate decision to detain him, he would, during that period, in fact continue to be detained for the purpose of removal, although that detention would have to be regarded as unlawful, in the light of the foregoing considerations. In that case, the period relating to the asylum proceedings would, for the same reasons as apply in the case of suspension of the execution of a removal decision because of judicial review proceedings, have to be taken into account when calculating the maximum periods laid down by Article 15(5) and (6) of the Return Directive.

90. I will add that the maximum duration of a third-country national's actual detention for the purpose of removal cannot be extended by a period of unlawful detention.

91. Although it appears, on the information available to the Court, that the latter situation holds good in the main proceedings, it is for the national court to determine whether the compulsory detention during the period in which he was an asylum applicant was based on the relevant rules relating to proceedings for the grant of asylum or whether it continued to be based on detention for the purpose of ensuring the removal of illegally staying third-country nationals.

92. In the light of the foregoing, I propose that the answer to the referring court's Question 1(b) should be that the provisions of Article 15(5) and (6) of the Return Directive on the maximum duration of detention for the purpose of removal do not, as a general rule, apply to periods of detention to which an asylum applicant is subject as part of proceedings for the grant of asylum. However, if a third-country national continues to be detained for the purpose of his removal within the meaning of the Return Directive after he has made an application for asylum and while that application is being considered, that period of detention must be taken into account when calculating the periods of detention laid down by Article 15(5) and (6) of the Return Directive.

3. Question 3

93. By its third question, the referring court seeks to obtain, in the light of the particular circumstances of this case, clarification of the

concept of 'reasonable prospect of removal' within the meaning of Article 15(4) of the Return Directive.

94. Under that provision, detention ceases to be justified and the person concerned is to be released immediately 'when it appears that a reasonable prospect of removal no longer exists for legal or other considerations'.

95. That condition reflects the fact that the detention of a third-country national who is staying illegally is justified only for the purpose of his removal and in connection with ongoing removal procedures being undertaken with due diligence, which implies that there is a possibility of removal. However, as is clear from the wording of Article 15(4) of the Return Directive, the existence of an abstract or theoretical possibility of removal, without any clear information on its timetabling or probability, cannot suffice in that regard. There must be a 'reasonable', in other words realistic, prospect of being able to carry out the removal of the person detained within a reasonable period. [35]

96. That said, it is obviously for the national court to assess, having regard to all the circumstances of the present case, whether such a reasonable prospect still exists or not.

97. It should however be stated, as regards the circumstances described by the referring court in relation to Question 3, that a reasonable prospect of removal appears no longer to exist where it appears unlikely that the third country concerned will yet agree, in the reasonably near future, that the person concerned can be admitted there, or where removal on the basis of a particular readmission agreement does not appear possible within a reasonable period, irrespective of the reasons involved.

98. Lastly, it is self-evident that if the maximum periods for detention, calculated in accordance with Article 15(5) and (6) of the Return Directive, have been exhausted, the person concerned must in any event be released immediately, whether or not there is a reasonable prospect of removal. [36]

35 — See in that regard the commentary, and the case-law cited, of the CAHAR on Guideline No 7 on forced return, cited above.

36 — In fact, having regard to the facts of this case, in particular the length of Mr Kadzoev's detention, and to the proposed answers to the first and second questions referred for a preliminary ruling, one can query the relevance of this question to the main proceedings.

99. Consequently, the answer which I propose to the referring court's Question 3 is that a person who has been detained for the purpose of his removal must immediately be released when the possibility of removing him within a reasonable period no longer appears realistic. A reasonable prospect of removal appears no longer to exist where it appears unlikely that the third country concerned will yet agree, in the reasonably near future, that the person concerned can be admitted there, or where removal on the basis of a particular readmission agreement does not appear possible within a reasonable period, irrespective of the reasons involved.

4. Question 4

100. By its fourth question, the referring court seeks in essence to ascertain whether Article 15(4) and (6) of the Return Directive allow the person concerned not to be released immediately, notwithstanding expiry of the maximum period of detention laid down by that directive, on the ground that he is not in possession of valid documents, that he has behaved aggressively, and that either he himself has no means of supporting himself or there is no third party willing to provide for his subsistence.

101. In that regard, suffice it to say that an extension of detention because of the circumstances mentioned would be wholly incompatible with the provisions of the Return Directive on the detention of an illegally staying third-country national, namely, as is clear from my earlier arguments, [37] that detention is permitted only as a measure of last resort, dependent on there being no other administrative measure which is less coercive, and subject to the requirement that it be strictly justified and that it be solely for the purposes of and in connection with the removal process — and that for a maximum period of 18 months. [38]

102. The answer to Question 4 is therefore that detention for the purpose of removal cannot be extended beyond the maximum period laid down in accordance with Article 15(4) and (6) of the Return Directive on grounds such as that the person concerned is not in possession of valid identity documents, that his conduct is aggressive, or that he has no means of supporting himself or other resources enabling him to stay within the Member State concerned.

37 — See, in particular, points 48 to 53 and 70 to 73 above.

38 — It must be added that detention, because of aggressive behaviour, based on some other provision of national law such as legislation intended to maintain public order or the criminal law, for example, is always conceivable.

V — Conclusion

103. In the light of the foregoing, I propose that the Court should hold the questions referred for a preliminary ruling to be admissible and to give the following answers to the Administrativen sad Sofia-grad:

— In order to assess the lawful duration of a period of detention and its continuation on the basis of legislation by which Article 15(5) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals were transposed into national law, account must be taken of the actual duration of that detention, including, consequently, periods of detention which precede the date of the entry into force of the transposing legislation;

— The provisions of Article 15(5) and (6) of Directive 2008/115 on the maximum period of detention for the purpose of removal do not, as a general rule, apply to periods of detention to which an asylum applicant is subject as part of proceedings for the grant of asylum. However, if a third-country national continues to be detained for the purpose of his removal within the meaning of that directive after having made an application for asylum and while that application is being considered, that period of detention must be taken into account when calculating the periods of detention laid down by Article 15(5) and (6) of the directive;

— When calculating the duration of detention in accordance with the provisions of Article 15(5) and (6) of Directive 2008/115, account must be taken of the period of detention during which execution of a removal decision was suspended, under an explicit provision of national law, because of judicial review proceedings brought against that decision;

— A person who has been detained for the purpose of his removal must immediately be released when the possibility of removing him within a reasonable period no longer appears realistic. A reasonable prospect of removal appears no longer to exist where it appears unlikely that the third country concerned will yet agree, in the reasonably near future, that the person concerned can be admitted there, or where removal on the basis of a particular readmission agreement does not appear possible in a reasonable period, irrespective of the reasons involved;

— Detention for the purpose of removal cannot be extended beyond the maximum period laid down in accordance with Article 15(4) and (6) of Directive 2008/115 on grounds such as that the person concerned is not in possession of valid identity documents, that his conduct is aggressive, or that he has no means of supporting himself or other resources enabling him to stay within the Member State concerned.